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OGC REVIEW COMPLETED

20 August 1954

Memorandum for: Mr. Houston

Subject : Medical Records

1. You have requested a statement of the legal aspects of release of medical information contained in Government documents. From the file forwarded with your request we gather that you are specifically interested in the legal extent of the duty and the authority of the Medical Office to retain as privileged, information received by the Medical Office from Agency employees in the course of performance of its functions.

2. While at common law no privilege is extended to communications between physician and patient, under statutes in most states (see Title 14, D. C. Code, Section 308) the physician cannot be compelled to testify to them or to reveal them to third persons unless his patient consents. This general statement must be qualified in several respects for more complete accuracy. First, in order to be privileged the relation must be confidential and it must be grounded in contract, express or implied. The general rule is that no privilege attaches where a physician is consulted for the purpose of examination only (and treatment is not expected), as where a person is examined solely to determine his physical ability to work. In short, no privilege attaches to an examination by a wholly disinterested physician when the purpose of the examination is not for the purpose of treatment, but for some independent purpose known to the person examined. Secondly, before information may be excluded as privileged it must appear that it was such as the physician acquired during the existence of the relation, and while professionally attending the patient. Thirdly, most statutes regarding the disqualification of physicians to testify do not as a rule make that disqualification general, but limit it to information necessary to enable the physician to prescribe for the patient or otherwise discharge his professional duties.

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3. Since statutes making communications between physician and patient privileged are intended as a protection to the patient rather than a mere inhibition to the physician, it is a privilege which the patient may waive. Waiver of the statutory privilege may be either express, as in an application for a life insurance policy, or it may be implied from the acts of the patient.

4. With the foregoing expository statement in mind, we would consider the question of privilege as it relates specifically to CIA's medical records. The attached file indicates that the basic function of the Medical Office for which medical records are kept is to furnish Agency medical support including (1) pre-employment and periodic employment physical examinations, (2) providing first aid assistance, and (3) providing medical information to assist in the presentation of claims to the BEC.

5. As indicated in a preceding paragraph, the general rule is that there is no privity and no privilege attached where a physician is consulted for the purpose of examination only and treatment is not expected. This rule would, in my opinion, preclude a claim of privilege with respect to information obtained during the course of physical examinations conducted by Agency doctors to determine an employee's suitability for continued employment in connection with the authority contained in Section [redacted]

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[redacted] The Civil Service Commission recognizes this situation at page MI-27 of the Federal Personnel Manual by recommending that the actual records of a medical examination be held confidential by the Health Service only with the understanding that "... medical officers are obligated to make suitable recommendations concerning the physical fitness of appointees for job assignments, including any statement which may be necessary regarding physical limitations as to reassignment."

6. With respect to the administration of first aid or other treatment of Agency employees by the Medical Office, it would be my opinion that communications between the employee and the physician which comply with the criteria enumerated above may be regarded as privileged and may be maintained by the Medical Office in confidence. However, this initial privilege may be waived at the instance of the patient.

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7. In BEC cases it would appear to me that no privilege would attach to medical records concerned. Although there is evidence to the contrary, it would be my opinion that the presentation by an employee of a claim under the FECA would constitute a waiver of what privilege he might otherwise enjoy. The question is academic, however, because Section 1.21 of Part I of Chapter B of the United States Employees' Compensation Act specifically provides that all records, medical and other reports and other papers relating to the disability or death of a person entitled to compensation benefits from the United States under the Act are the official records of the Bureau of Employees' Compensation and are not records of the agency, establishment, or department making or having the care or use of such records. It should be added that the Section provides that no person shall disclose information from these records except upon the written approval of the Bureau. This approval may be assumed, in my opinion, in cases where the Bureau has requested specific medical information from this Agency.

8. For your information I am attaching a copy of Section 1 of Chapter 2 of the Principles of Medical Ethics of the American Medical Association, 1937 Edition. So far as the CIA Library can discover, this is the latest edition of this code.



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Office of General Counsel

Attachments

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